United States Court of Appeals

for the Second Circuit

APPELLANT'S PETITION FOR REHEARING

76-1435

UNITED STATES COURT OF APPEALS

For the Second Circuit

Docket No. 76-1435

UNITED STATES OF AMERICA,

Appellee,

v.

JOHN M. KING and A. ROWLAND BOUCHER,

Appellants.

On Appeal from the United States District Court

For the Southern District of New York

PETITION FOR REHEARING BY APPELLANT KING

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PETITION FOR REHEARING BY APPELLANT KING

This petition is respectfully submitted on behalf of appellant John M. King, pursuant to Rule 40 of the Federal Rules of Appellate Procedure, on the ground that certain of this Court's findings, as expressed in its opinion in this case dated July 22, 1977, rest upon factual assertions which do not have support in the record. The following specific points are proffered as bases for a reconsideration of this Court's decision.

A. The Mecom Bankruptcy Documents

This Court approved the trial judge's exclusion of allegedly prior inconsistent statements contained in the bankruptcy papers of government witness John Mecom on the ground that the ruling was justified under Rule 403 Fed. R. Evid. The Court agreed with the trial judge that, under the balancing test provided in Rule 403, the "modest potential relevance" of the documents was outweighed

by "danger of unfair prejudice". We respectfully and urgently submit that the record does not support the Court's finding. The documents were in fact importantly relevant and there is nothing whatever in the record upon which to base an allegation of prejudice.

1. On page 4886 of its opinion, the Court sets forth the factors justifying the invocation of Rule 403. It is respectfully submitted that none find support in the record.

a. There is nothing in the record to indicate that, as of the time the documents were excluded, they had caused or would have caused any prejudice or "untoward effect upon the jury", and this Court has not pointed to any such indication. How, as of that time, could the jurors have been prejudiced against the Government when they had not yet seen the documents, no portions had been read to them and only the Government's attorney had conducted any questioning regarding the documents. If, as indicated by the trial court, there was some problem with the volume of the documents, or with the fact that they contained authenticating seals, these problems were easily curable. As defense counsel suggested, the relevant portions could have been segregated into sub-exhibits before they were presented to the jury. There is absolutely no suggestion, either by the trial court or in this Court's opinion, why this simple procedure would not have totally obviated any possible prejudice.

b. The "prolonged failure to pinpoint" the pertinent inconsistencies (even if it was in fact prolonged, which we submit was not the fact) was not something that the jury was aware of, much less affected by.

c. Defense counsel's "refusal to explore the relationship between the bankruptcy papers and Mecom's testimony" was hardly prejudicial. The documents were not inherently confusing and the relationship between them and Mecom's testimony was obvious -- they contradicted each other. The prosecutor was free on redirect examination to bring out anything he felt was helpful to him regarding the documents, and he did so effectively. In any event, as of the time the documents were excluded, any gap in pertinent testimony could easily have been supplied. Instead, the trial court took the opposite course and cut off all further inquiry.

d. The stated basis for the Court's agreeing with the trial judge as to the slight relevance of the documents was that "there were several reasons why Mecom and his lawyer-and-accountant aides might not wish to mention the side-agreement with appellants in the bankruptcy papers" (Opinion at 4886). This statement is in contradiction to the record. Mecom's bankruptcy lawyer, Mr. Carwile, testified at trial that if, at the time of the bankruptcy proceedings, he had known about any buy-back agreement in connection with the Arctic contract he would have used such information to attempt to negate the contract (Trial Transcript, "Tr." 4124).

2. This Court is critical of defense counsel in several places in its opinion for having failed to point out the specific inconsistent statements contained in Mecom's bankruptcy documents to the trial judge and the jury at the time that

the documents were initially received in evidence (Opinion at 4884-86).

a. The Court apparently does not take into account the fact that defense counsel was following precisely the procedure that had been sanctioned by the trial court during the presentation of the Government's case, when the prosecution put into evidence far more voluminous records (See, eg., Tr. 401-03, 422-23, 430-32, 450-51).

b. Defense counsel was obliged to offer each entire document since they were bound together by court seals and the admissibility of the relevant portions turned, in part, on defense counsel's ability to authenticate the documents as having been filed as official court records.

c. The Court's opinion specifically refers to defense counsel's failure to point out the alleged inconsistencies to "court and jury". However, as of the time of the documents' exclusion, the only person to whom the inconsistencies needed to have been pointed out was the prosecutor. There can be no doubt that the prosecutor was informally made aware of the specific passages containing allegedly inconsistent statements because those passages were physically marked with paper clips and the prosecutor said nothing, either orally or in the trial memorandum he submitted at the time, to indicate that he needed any information as to the pertinent portions.

It was the trial court and the jury that this Court says should have been informed of the alleged inconsistencies.

But, prior to the time when the documents were excluded, there was no reason -- indeed, there had been no opportunity -- for defense counsel to call the specific inconsistencies to the attention of either the trial court or the jury. The documents had quickly been admitted into evidence without the point being raised. Since the prosecutor had not raised any objection and, specifically, had not contested the fact of the existence of inconsistent statements within the documents, the Court had not expressed any desire to see them. The first inkling that defense counsel had that the trial judge desired the inconsistencies to be pointed out to him prior to their being read to the jury was when the court suddenly reversed his position and excluded the documents. He then rejected defense counsel's offer to specify the inconsistencies.

As for the jury, none of the contents of the documents could have been read to them because the Government had requested time to review the documents first (Appendix, "App." 1367). Absent this request, defense counsel had every right to read the pertinent portions of the documents to the jury just as soon as they had been admitted into evidence. Surely defense counsel's refraining from doing so, at the request of the prosecutor, affords no basis for later excluding the documents.

3. This Court also suggests that the trial court properly excluded the documents because, as of the time of the exclusion, the defense counsel had not "sought to use the allegedly pertinent portions in cross-examination" (Opinion at 4884). The Court later implies that defense counsel had an obligation to

ask more questions of Mecom in order to avoid exclusion of the documents under Rule 403, because of possible prejudice, confusion or misleading the jury (Opinion at 4886, footnote). As discussed above, no one has yet pointed out what such prejudice or confusion might be or how the jury could possibly have been misled if the trial court had acquiesced in defense counsel's suggestion to make subexhibits. This suggestion was hardly, as the Court states, "tardy" (Opinion at 4886), since it was made the first time anyone raised the issue and only a few minutes after the initial offer. If the trial court felt that further questioning of Mecom would somehow help the jury he had only to say so.

It would be particularly inappropriate to penalize defense counsel for his limited use of the documents in his initial cross-examination of Mecom, because that limitation was influenced by the fact that the trial court, in front of the jury, had pressed him to conclude his examination (App. 1371-72). Under these circumstances, there was no requirement, as the Court indicates (Opinion at 4885) to point out the specific inconsistencies, to explain further the relevance of the documents, and to connect Mecom with the alleged contradiction. It was only when the prosecutor strongly suggested in his redirect examination that Mecom was somehow unconnected with the admissions made in his own bankruptcy submissions that defense counsel had the need to dispel that impression.

It is simply not true, as this Court suggests

(Opinion at 4885), that defense counsel had a second opportunity to raise these questions. The voir dire examination requested by defense counsel immediately prior to the exclusion of the documents was not a substitute for cross-examination, as the trial court had just made abundantly clear in denying the Government the right to go into substantive cross-examination in the form of a voir dire (App. 1369-70).

4. This Court erroneously states that defense counsel had intended merely to read the inconsistent statements to the jury, but that after the documents were excluded "he now realized that he should have brought out more from Mecom" (Opinion at 4884). The reason why defense counsel sought to examine Mecom about the documents was that subsequent to his cross-examination, the prosecutor had questioned Mecom exhaustively about the documents and had elicited repeatedly from Mecom the statement that he had not "prepared" the documents. Under such circumstances, it obviously became necessary, for the first time, for defense counsel to rebut the impression that there was something significant about the fact that Mecom had not himself prepared the documents. Defense counsel did not intend to claim that Mecom physically prepared the documents, but the defense was clearly justified in wanting to bring out, in response to the prosecutor's redirect examination, Mecom's connection with the documents -- a connection that defense counsel had initially felt had been implicit on the face of the documents.

5. This Court expresses the opinion that defense

counsel did not desire to cross-examine Mecom "extensively or thoroughly" on the basis of the documents (Opinion at 4885). In fact, defense counsel's original cross-examination of Mecom with respect to the documents was cut short when he was discouraged from continuing by the Court (App. 1371-72). The need for further cross-examination did not arise until the prosecutor conducted a lengthy redirect examination. In any event, even if this Court were correct about defense counsel's original intention, it does not afford any justification for the trial court's exclusion of the documents themselves.

6. This Court erroneously states that the record "as the defense left it" showed that Mecom's personal connection with the bankruptcy documents was "far from deep" (Opinion at 4885). To the contrary, as the defense "left" the record, the documents spoke for themselves. The alleged lack of depth of Mecom's relationship to the documents was raised only during the prosecutor's lengthy redirect examination. As previously noted, it was this examination that made it necessary for defense counsel to question Mecom again.

7. While this Court has noted that three of the excluded documents were ultimately received in evidence, the opinion ignores King's contentions that (i) the tardy admission of these few documents were insufficient to make all the desired points raised in the documents and, more importantly, (ii) the trial court's refusal to permit defense counsel to cross-examine Mecom following the Government's redirect

precluded King from answering the Government's explanation of the documents. In short, the trial court's ruling enabled the prosecutor, in his summation, to insulate Mecom from the documents on the suggested ground (as first developed on redirect examination) that Mecom's lawyers and accountants, rather than Mecom himself, were responsible for the documents. Since defense counsel was not given the chance to question Mecom on the point, the prosecutor was free to explain away the documents without King's having any opportunity to respond.

8. In summary, defendant King respectfully submits that the requirements of Rule 403 were not met by the trial judge because: (i) the documents, as flat contradictions of Mecom's testimony, were vitally important, and the Court's only stated reason for finding to the contrary is contradicted by the record; (ii) neither this Court nor the trial court has ever explained what possible prejudice would have existed if, when the issue first was raised, the trial judge had followed defense counsel's suggestion to make sub-exhibits for the jury, instead of excluding the documents.

B. Pre-Indictment Delay

This was not a case, such as United States v. Lovasco, 45 U.S.L.W. 4627 (June 9, 1966), where the prosecutor delayed obtaining an indictment while in good faith continuing his investigation to firm up his case. In this case, the Government intentionally sat on information concerning an alleged Arctic side agreement, intending to use such information tactically at a later date in support of wholly unrelated cases. Such

delay can hardly be fairly characterized as "investigative". Indeed, in a footnote to the Lovasco opinion, Justice Marshall noted that Professor Amsterdam has catalogued some of the "noninvestigative reasons for delay" (emphasis added), including the following:

> "'[I]f there is more than one possible charge against a suspect, some of them may be held back pending the disposition of others in order to avoid the burden upon the prosecutor's office of handling charges that may turn out to be unnecessary to obtain the degree of punishment that the prosecutor seeks.'"

The same footnote goes on to quote with approval Professor Amsterdam's remark that while "[i]t is customary to think of these delays as natural and inevitable ... various prosecutorial decisions -- such as the assignment of manpower and priorities among investigations of known offenses -- may also affect the length of such delays" (Id. at 4631, fn. 19). The unmistakable import of this footnote is that the Supreme Court would characterize the delay which occurred in this case as noninvestigative and, therefore, not within the rationale of Lovasco.

C. Admission of Evidence as to Profitability of KRC's Business with FOF and of Loss to FOF from the Mecom and COG Transactions

We submit that the following factual errors appear in the section of this Court's opinion under the above cited heading (pp. 4985-98):

1. The Government's effort to prove the profitability of KRC's business with FOF involved numerous witnesses, not

simply the SEC accountant and charts which he prepared. Of the 47 witnesses that appeared at trial (not including King and Boucher), 17 were questioned by either the prosecution or the defense on this issue. The subject assumed an importance during the trial which, we submit, overcame the narrow issue of the existence of side agreements to which this case should have been limited.

2. While it is true that King conceded at trial the profitability of KRC's business with FOF, this was not, as the Court's opinion implies, a grudging or unexpected concession. There was never any doubt but that this would be the position of the defense. The only reason why a stipulation could not previously be reached was that the Government wanted to be able to include in the stipulation information as to KRC's business dealings with FOF which defense counsel felt would be misleading and unfairly prejudicial to the defendants if left unexplained.

3. This Court's reliance upon the fact that the Government's presentation "followed the way in which KRC and Colorado Corporation kept their books" is misplaced. The books that were relied upon as the source of the presentation were not prepared or kept in such a way as to justify the Government's use of them. King and KRC's former chief financial officer explained the true use of these records, and no witness disputed their characterization. The turnkey ledgers were not KRC's definitive financial records for representing profits and

losses, but were computerized management tools designed for seeing whether KRC had received and properly booked all bills for work done in a particular year in accordance with management's original authorizations for expenditures (i.e., out-of-pocket expenses). In other words, the books in question were designed to enable KRC management to ascertain whether particular projects were falling within budgetary guidelines. This control system was particularly useful for turnkey drilling projects, which represented a substantial part of the FOF business, but not for lease sales (the sales of interests in exploratory acreage), where the largest markups occurred and the most indirect costs were incurred. The Government's presentation dealt primarily with lease sales, rather than turnkey drilling sales. While the defendants attempted to explain the complex aspects of KRC's business, and the reasons why the turnkey ledgers were an inappropriate source for gross profit margin, it was too much to expect that a jury would be able to appreciate the subtle distinctions upon which these arguments were premised, and more likely that it would accept the invitingly simple argument by the Government that it was merely repeating what was shown in KRC's records. Moreover, as defense counsel argued in pre-trial motions, an attempt to refute the Government's presentation and place their calculations in proper perspective would have required virtually unlimited access to KRC's property files and financial

records (which King did not have) and would have resulted in a prohibitively lengthy trial.

D. Exclusion of Evidence as to the 1976 Value of the Arctic Interests

We believe that the Court was in error when it assumed that the evidence of 1976 value was subject to dispute. The evidence that the defendants attempted to introduce consisted of reports on the results of exploratory drilling on properties owned by KRC and FOF. In other words, the fact of significant discoveries of natural gas on such properties could not have been seriously in question.

Moreover, this Court sustained the introduction of Neil MacKenzie's statement and approved the prosecution's argument to the jury that Boucher's silence showed that the price paid by COG was too high and that Boucher knew it. If the Government could argue this to the jury, fundamental fairness would seem to dictate that the defendants could argue that the price was not too high and that in their view the Arctic was worth considerably more than the price paid by Mecom and COG because of its vast potential. The reasonableness of this view, and therefore the probability that other knowledgeable oil people (such as Mecom and COG) would be willing to purchase interests in the Arctic without side agreements, would have been made substantially more credible in the eyes of lay jurors if they had been permitted to know that, as King

continuously stated, the Arctic was indeed a very valuable area for oil and gas production.

CONCLUSION

For the reasons set forth herein, appellant King respectfully requests a rehearing by this Court of the appeal from his conviction.

Dated: August 5, 1977

Respectfully submitted,

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- x

STATE OF NEW YORK)
: ss.:
COUNTY OF NEW YORK)

ERIC Wicks , being duly sworn, deposes and says that he is over the age of 18 years, is not a party to this action, and on the 5th day of August, 1977, he served on the following persons the accompanying Petition for Rehearing by Appellant King by personally delivering the indicated number of copies of such Petition to each party at their addresses as set forth below:

Clerk of the Court
United States Court of Appeals
for the Second Circuit
U.S. Court House
Foley Square
New York, New York
-- 25 copies

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Andrew J. Maloney, Esq.
Maloney, Viviani & Higgins
630 Fifth Avenue
New York, New York
-- 1 copy

Eric Wicks

Sworn to before me this
5th day of August, 1977.

Joseph C. Stankard

Notary Public

JOSEPH C. STANKARD
Notary Public, State of New York
No. 41-9152900
Qualified in Queens County
Term Expires March 30, 1978

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